IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:	)	
	)	Adversary Proceeding
MICHAEL W. McDOUGALD	)	
TAMMY M. McDOUGALD	)	Number 90-4177
(Chapter 13 Case 89-40326)	)	
	)	
Debtors	)	
	)	
	)	
	)	
MICHAEL W. McDOUGALD	)	
TAMMY M. McDOUGALD	)	
	)	
Plaintiffs	)	
	)	
	)	
	)	
v.	)	
	)	
THE INTERNAL REVENUE SERVICE,	)	
being a subdivision of the	)	
United States of America	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

On November 1, 1990, a trial was held upon the Complaint to Recover Money or Property for the Defendant's alleged willful violation of the automatic stay provisions of 11 U.S.C. Section 362. Upon consideration of the evidence adduced at trial, the briefs and other documentation submitted by the parties, and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Debtors filed a petition under Chapter 13 of the Bankruptcy Code with this Court on March 7, 1989, and their case was confirmed on September 27, 1989. The Debtors did not list any debt due to the Internal Revenue Service ("IRS") on their original petition and testified that they were "unaware" of any debt to the IRS before they received a notice of levy for 1986 taxes sometime in June, 1989. Upon receipt of the notice of levy, the Debtors contacted their attorney who then filed a proof of claim on behalf of the IRS for $1,766.46. As of the date of the hearing, the IRS had been paid $559.36 on that claim. It was stipulated that the Debtors did not notify the IRS that they had filed a proof of claim nor that they had filed bankruptcy. However, it was further stipulated that a letter had been sent to the IRS by the Clerk of this Court on July 5, 1989, notifying it of the filing of the proof of claim on its behalf. On May 7, 1990, the IRS sent the Debtors a letter advising them that $1,061.00 of their 1989 tax refund was offset for delinquent 1986 taxes. In response, the Debtors filed the present adversary proceeding alleging willful violation of the automatic stay provisions of 11 U.S.C. Section 362 and praying for attorney's fees, compensatory, and punitive damages pursuant to 11 U.S.C. Section 362(h). At some point prior to the November hearing, the IRS returned the $1,061.00 which had been withheld from the Debtors' 1989 tax refund with interest in the amount of $55.77 for a total of $1,116.77.

CONCLUSIONS OF LAW

The Debtors brought this adversary proceeding seeking actual damages, including costs and attorney's fees, and punitive damages pursuant to 11 U.S.C. Section 362(h)[1] for alleged willful violation of 11 U.S.C. Section 362(a)[2] by the Defendant IRS. The IRS has moved to dismiss the adversary proceeding or for summary judgment inasmuch as the United States has not waived its sovereign

[1] 11 U.S.C. §362(h) provides:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstance, may recover punitive damages.

[2] In relevant part, 11 U.S.C. §362(a) provides:

> Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of--
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title . . .

immunity. In the absence of such a waiver, the IRS argues that this Court lacks in personam jurisdiction over the United States.

Alternatively, the IRS bases its Motion to Dismiss upon Debtors' failure to state a claim upon which relief may be granted. Finally, the IRS moves for dismissal on the ground that the Debtors improperly named the IRS as a defendant when the proper defendant should be the United States.

Initially I note that the records reflect proof of service, dated September 21, 1990, and filed with the Court on September 25, 1990, upon the U.S. Attorney General, Justice Department, Washington, D. C., and Hinton R. Pierce, Assistant U.S. Attorney, Savannah, Georgia, as well as the IRS Bankruptcy and Insolvency Division, Atlanta, Georgia. I find that the United States has received adequate notice of the pendency of this action and will not be prejudiced in maintaining its defense on the merits in that it knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it. Therefore, I will dismiss the Internal Revenue Service from this action and substitute the United States of America as a party defendant. See Scott v. Internal Revenue Service, 622 F.Supp. 537, 538 (E.D.Tenn. 1985); Bornholdt v. Brady, 869 F.2d 57, 69 (2nd Cir. 1989); 26 U.S.C. §7422(f)(1). The Motion to Dismiss filed by the United States is accordingly denied.

The second jurisdictional defense raised by the IRS concerns the doctrine of sovereign immunity. The IRS asserts that this Court lacks jurisdiction to award damages against the IRS

pursuant to §362(h) because the IRS has not waived sovereign immunity.

The doctrine of sovereign immunity bars all lawsuits against the United States in the absence of express Congressional consent, Block v. North Dakota, 461 U.S. 273, 103 S.Ct. 1811, 75 L.Ed 2d 840 (1983), and any such consent is strictly construed. United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed. 2d 259 (1979).

> Th[e] doctrine has its origin in the English concept that the governing royalty should be permitted to exercise his or her authority undisturbed by liability. As applied in its modern context, sovereign immunity is grounded in the practical realization that essential governmental activities should not be interrupted or slowed by litigation or liability.

In re Lile, 96 B.R. 81 at 83 (Bankr. S.D.Tex. 1989) (citations omitted). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed". United States v. Mitchell, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed 2d 607, 613 (1980) (quoting United States v. King, 395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.Ed. 2d 52, 56 (1969)).

Congress has provided for a limited waiver of sovereign immunity in 11 U.S.C. Section 106, which provides:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or

> occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity--
>
> (1) a provision of this title that contains 'creditor', 'entity' or 'governmental unit' applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units.

11 U.S.C. §106(a) clearly provides that Congress has waived the sovereign immunity of a governmental unit only when the following conditions are met:

> (1) the estate has a claim against the governmental unit and the governmental unit has a claim against the estate;
>
> (2) the claim against the governmental unit is property of the estate; and
>
> (3) the claims of each must arise out of the same transaction or occurrence.

Cowart v. Internal Revenue Service (Matter of Cowart), Ch. 13 Case No. 88-40382, Adv. No. 90-4093, slip op. at 12 (Bankr. S.D. Ga. Dec. 4, 1990) (citing In re Davis, 20 B.R. 519, 521 (Bankr. M.D. Ga. 1982) vacated on other grounds 899 F.2d 1136 (11th Cir. 1990)).

In Cowart, supra, I found that there had been no waiver of sovereign immunity inasmuch as there was no evidence of the

existence of an IRS claim since the IRS had been fully paid on its claim through the debtor's previous Chapter 13 plan. There the offset of the debtor's tax return was attributed to "computer error" and the IRS consistently denied the existence of a claim. This case is distinguishable from Cowart is that a claim does exist in the Debtors' case, although filed on behalf of the IRS by the Debtor. The Debtor has asserted a claim against the IRS for money damages through the prosecution the 362(h) action. The IRS argues that the filing of a proof of claim by the Debtor on behalf of the IRS is not sufficient to provide a basis for the waiver of sovereign immunity. In Taylor v. United States (In re Taylor), Ch. 13 Case No. 89-11583, Adv. No. 90-1036, slip op. (Bankr. S.D. Ga. Sept. 24, 1990), the question of whether the United States' assertion of sovereign immunity deprives a bankruptcy court of subject matter jurisdiction where a claim exists but no proof of claim is filed was presented to the Augusta Division of this Court. The Court denied the Governments' Motion to Dismiss, noting:

> As to the requirement that the governmental unit have a claim, as of the date of filing of the underlying Chapter 13 case the USA had a claim for 1988 tax liability as "claim" is defined under the Bankruptcy Code and used in §106(a). A "claim" means a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. 'The express language of §106(a) says nothing about the necessity of the government unit filing a proof of claim in order to trigger the waiver of sovereign immunity. By the clear terms of the statute, the waiver is triggered by the existence of the governments 'claim', not the filing of the proof of claim.'
>
> Id. at 5-6 (emphasis provided, citations omitted).

Accordingly, it is irrelevant whether the proof of claim was filed by the governmental unit or by the Debtor on behalf of a governmental unit as it is the existence of the claim which triggers the waiver of sovereign immunity. A proof of claim was filed on behalf of the IRS by the Debtor on June 29, 1989, and as of the date of the hearing, the IRS had been paid $559.36 on that claim. The letter notifying the Debtors of the offset of their 1989 taxes was sent a year later in June, 1990. The IRS has not denied the existence of a claim in this case and in fact has reaped the benefits of payments on its claim for over a year. It is clear, therefore, that the IRS has a claim against the estate within the meaning of §106(a). It has been established that a claim for damages by a debtor under §362(h) is property of the estate as defined in 11 U.S.C. Sections 541(a)(1) and 1306(a)(1)[3], Taylor,

[3] 11 U.S.C. 541(a)(1) provides in relevant part:

> (a) The commencement of a case under Section 301 . . . of this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interest of the debtor in property as of the commencement of the case.

11 U.S.C. §1306(a)(1) provides:

> (a) Property of the estate includes in addition to the

supra at 5 (citing United States v. McPeck, 910 F.2d 509 (8th Cir. 1990)), and therefore the second condition of §106(a), that the claim against the governmental unit be property of the estate, has been met.

As to the remaining condition, that the claims of both the Debtor and the IRS must arise out of the same transaction or occurrence, I adopt the analysis set forth in Taylor:

> The remaining criteria for §106(a) waiver of sovereign immunity requires a determination that the claim against the governmental unit arose out of the same transaction or occurrence as the governmental unit's claim. A determination of 'some transaction or occurrence' requires the same analysis as whether the claim would be [sic] compulsory counterclaim under Federal rule of Civil Procedure 13. Rule 13 defines a compulsory counterclaim as a claim that 'arises out of the transaction or occurrence that is the subject matter of the opposing party's claim'. Binding precedent requires that this Court employ the 'logical relationship test' in establishing whether or not the claims are sufficiently related to amount to compulsory counterclaims. Under this test, a logical relationship exists when

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> property specified in Section 541 of this title --
>
> (1) All property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11 or 12 of this title, whichever occurs first.

'the same operative facts [sic] serves as the basis for both claims or the aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant'. The following quote is directly on point and best articulates the basic approach under the 'logical relationship' test which requires a determination

> Whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all issues should be resolved in one lawsuit. A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts [sic] serves as the basis of both claims or the aggregate core of facts upon which the claim rests [sic] activates additional legal rights otherwise dormant in the defendant.
>
> In this case, the IRS claim against the debtor arises from the debtor's failure to pay taxes owed. The debtor's claim arises pursuant to the attempt by the IRS to collect these taxes owed by the debtor. The basis of both cases revolve around the aggregate core of facts regarding the debtor's unpaid taxes. Therefore, . . . under these circumstances the essential facts related to the tax claim itself are logically related to the government's collection activities.

Taylor, at 7-8 (quoting United States v. Bulson (In re Bulson), 117 B.R. 537 (9th Cir. BAP 1990) (other citations omitted).

Accordingly, I find that the three conditions for a waiver of sovereign immunity under 11 U.S.C. §106(a) have been met and therefore the United States has waived sovereign immunity with

respect to the Debtor's §362(h) claim and this Court has subject matter jurisdiction over the Defendant.

Having addressed the jurisdictional issues, I now address the IRS defense on the merits. The IRS argues that the Debtor has failed to state a claim upon which relief may be granted because the Debtor failed to allege a factual basis upon which a case for "willful" stay violation may be made. I disagree.

The automatic stay of 11 U.S.C. §362 is one of the fundamental debtor protections provided in the bankruptcy laws. "It gives the debtor a breathing spell from his creditors. it stops all collection efforts, all harassment, and all foreclosure actions." H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); 1978 U.S. Code Cong. & Admin. News 5787, 6296. The legislative history accompanying §362(a)(6) indicates that the section was aimed at "prevent[ing] creditors from attempting in any way to collect a pre-petition debt". Id. at 342, 1978 U.S. Code Cong. & Admin. News at 6296.

> Paragraph 6 is intended to prevent creditor harassment of the debtor in attempting to collect pre-petition debts. The conduct prohibited ranges from that of an informed nature, such as by telephone contact or by dunning letters to more formal judicial and administrative proceedings that are also stayed under paragraph one. The automatic stay provision functions to facilitate the orderly administration of the debtor's estate.
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> Collier on Bankruptcy, Vol. 2, §362.04, p. 362-41. (15th Ed. 1990).

The stay operates to bring the property of the debtor into the custody of the "Bankruptcy Court by a filing of a petition, and no interference with that custody can be countenanced without the Court's permission". In re Adana Mortg. Bankers, Inc., 12 B.R. 989 (Bankr. N.D. Ga. 1980), vacated by joint motion, 687 F.2d 344 (11th Cir. 1982). Without such provision the orderly liquidation or rehabilitation of the debtor would be impossible. H.R. Rep. No. 95-595 at 174; S. Rep. No. 95-989, 95th Cong. 2d Sess. 49 (1978).

As a result of 1984 legislation, subsection (h) was added to Section 362, providing for a recovery of damages, costs, and attorney's fees by an individual damaged by a willful violation of the stay. The award of damages under Section 362(h) is analogous to a finding of contempt. Where violation of the automatic stay is inadvertent or technical, contempt is not an appropriate remedy, but if the violation is willful and knowing, contempt will be appropriate. In re LaTempa, 58 B.R. 538 (Bankr. W.D. Va. 1986). To support a finding of contempt on the basis of a violation of the automatic stay the party accused must be shown to have notice or knowledge sufficient to be aware of the proscribed conduct. Id. When a creditor's violation of the automatic stay is unintentional, the remedy of contempt is inappropriate and overly harsh. In re Stern, 44 B.R. 15 (Bankr. D. Mass. 1984).

A party is not required to have formal notice of the filing of a bankruptcy petition to be held in contempt of the automatic stay provisions so long as such party has obtained knowledge of the order from some source. In re Tom Powell & Son, Inc., 22 B.R. 657 (Bankr. W.D. Mo. 1982). There need not be

subjective conscious intent to do harm for an act to constitute a willful violation of the stay. Instead, all that is required is that a party violated the stay with actual knowledge or reason to know that a case had been filed. In re Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985).

It was stipulated at the hearing that a letter was sent to the IRS notifying the Service that a proof of claim had been filed on its behalf. This constitutes actual notice of the Debtor's filing. Moreover, it was established that the IRS had been paid $559.36 on its claim by the November hearing. The case file contains computer printouts generated by the Chapter 13 Trustee's office which clearly show distribution to the IRS on its claim. Notwithstanding actual knowledge of the Debtor's filing, the IRS attempted to collect its debt through offset of the Debtor's 1989 tax refund. That action constitutes a willful violation of the automatic stay provisions and triggers the sanctions provisions of Section 362(h).

The Debtors have alleged actual damages of $30.00 and have prayed for whatever damages the Court deems just and proper for their pain and suffering as well as attorney's fees and $10,000.00 in punitive damages. In support of their prayer for compensatory damages, the Debtors testified that they depended upon the 1989 refund and in its absence fell two months behind in their rent, had their electricity turned off and were forced to pawn personal household items and borrow money from a relative. I do note, however, that the IRS has since returned the wrongfully withheld refund of $1,061.00 plus interest in the amount of $55.77, for a

total of $1,116.77. Accordingly, the Debtor will be awarded compensatory damages of $30.00.

At the conclusion of the hearing on this Motion, the Debtors' attorney was ordered to submit proposed findings of fact and conclusions of law in compliance with Bankruptcy Local Rule 4(b) of the Southern District of Georgia, which provides:

> (b) Adversary Proceedings. In all adversary proceedings, plaintiff and defendant shall separately file with the Court, not later than the date and time scheduled for trial a set of proposed findings of fact and conclusions of law, based on evidence which each reasonably believes will be proven at trial, and containing relevant legal authority to support the conclusions reached.

Although the file contains an "Order" submitted by the Debtors' counsel with the Complaint, the "Order" is merely conclusory and is not in compliance with the Local Rule. Debtors' counsel did not submit additional Findings of Fact and Conclusions of Law as ordered by this Court at the November 1st hearing and accordingly, attorneys fees for the prosecution of this action will be denied. I further note that the file contains a Memorandum in Support of Motion to Dismiss, filed by the United States on October 29, 1990; Proposed Findings of Fact and Conclusions of Law, filed by the United States on November 1, 1990; and a Supplemental Memorandum in Support of Defendants Motion to Dismiss, filed by the United States on December 6, 1990.

In light of the fact that there presently exists some division among the courts as to the waiver of sovereign immunity by

governmental units, the fact that the IRS was not listed on the Debtors' original petition, and particularly the fact that the IRS returned the Debtors' refund with interest, I do not deem punitive damages to be appropriate.

11 U.S.C. §106(b) mandates that "any claim against a governmental unit that is property of the estate shall be offset against an allowed claim or interest of the governmental unit. This mandatory language comports with the established principle that an award to a plaintiff on a claim is ordinarily offset against an award to the defendant any counterclaims; a single judgment is entered for the excess, if any". McPeck, supra at 512. Accordingly, the tax claim established by the IRS must be offset against the damage award to the estate for the Service's willful violation of the §362 stay.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that the Debtors be awarded compensatory damages of $30.00 for the Defendant's willful violation of the automatic stay provisions of 11 U.S.C. §362(a).

IT IS ORDERED that the Debtors' claim for attorney's fees be DENIED for non-compliance with Bankruptcy Local Rule 4 of the Southern District of Georgia.

IT IS FURTHER ORDERED that Debtors claim for punitive damages be DENIED.

IT IS FURTHER ORDERED that, pursuant to 11 U.S.C. §106(b), the Debtors' claim of $30.00 be offset against the allowed claim of the Internal Revenue Service, a subdivision of the United States of America.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This _____ day of April, 1991.